91-688

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

WILLIAM TAYLOR,

Petitioner,

vs.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Is the failure of the administrative law judge and the District Court and the Circuit Court to give proper weight and credibility to the testimony and reports of claimants' personal positions as against the medical witnesses offered by the Social Security Administration a justification for review by the Supreme Court? Answer: Yes.

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No.

In The

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WILLIAM TAYLOR,

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vs.

SECRETARY OF HEALTH AND HUMAN SERVICES.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William Taylor, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above case on July 2, 1991.

OPINIONS BELOW

The opinion of the Federal District Court for the Western District of Pennsylvania is set forth in the appendix (5a). The judgment of the Third Circuit Court of Appeals is also set forth in the appendix hereto (3a).

STATEMENT OF JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on July 2, 1991. A timely petition for rehearing was denied on August 8, 1991 (1a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 405(a)(b).

STATEMENT OF THE CASE

The claimant is a 54-year-old man who has both a high school and a college education. He has been unable to engage in any substantial gainful employment since April 3, 1980 as a result of a back and neck injury. He also suffers from cardiovascular impairments, diminished grip and strength in his left hand, and has constant back and neck pain. The medical evidence presented by his treating doctors supports a determination of disability.

The problems suffered by Mr. Taylor, back and neck pain and unstable angina, affect his ability to function properly in a workplace. He has difficulty in concentrating on job assignments and is unable to walk, stand and sit for long periods or lift anything heavy. The administrative law judge did not give proper weight and credibility to the claimant's testimony from his personal doctors in regards to limitations and pain.

REASONS FOR GRANTING THE WRIT

The administrative law judge placed more weight on the consultative exams performed on the claimant rather than the claimant's ongoing treating physicians. On a pragmatic basis the treating physicians, over a period of years, can see the entire picture of a patient. They can determine the good days and the bad days as well as the ups and downs in the treatment process. They are much better equipped to make a final determination as to disability than a consultant who sees a patient for a short period of time on a day when he does not know whether or not the patient is having a remission of his symptoms. The treating physicians see both the remissions and the exacerbations. To place such hearing reliance on a consultative physician rather than the treating physician is a violation of the Rule cited below.

The administrative law judge failed to give the opinions of the treating physicians the great weight to which they are entitled. *Byron v. Heckler*, 742 F.2d 1232 at 1235 (10th Cir. 1984). In rejecting the treating physicians' opinion the administrative law judge should have given legitimate reasons for doing so. The only reason given in this case is that Dr. Monsour was a general practitioner and not an expert in various specialties. It is submitted that such is not a legitimate reason under *Byron*, cited above, and *Murry v. Heckler*, 722 F.2d 499 at 501 (9th Cir. 1983). Aside from the pragmatic reasons discussed above, the courts have recognized that giving the treating physicians' report great weight reflects expert judgment based on continuing observation of the patient's condition over a long period of time. *Todd v. Heckler*, 587 F. Supp. 1129 at 1132 (W.D. Ky. 1984). *See also, Murry v. Heckler*, 722 F.2d 499 at 502 (9th Cir. 1983) where the court stated the treating physician has a greater opportunity to observe and know the patient as an individual.

Reports of a consultative physician are entitled to very little

weight especially when contradicted by the evaluation of a treating physician. *Anderson v. Heckler*, 738 F.2d 959 at 960 (8th Cir. 1984). Therefore, it is the position of the claimant that the report of the consulting physicians who examined him do not constitute substantial evidence as found by the administrative law judge and confirmed by the District Court and Circuit Court since they were contradicted by the evaluation of his treating physician. *Allan v. Weinberger*, 522 F.2d 781 at 786 (7th Cir. 1977). *See also, Selig v. Richardson*, 379 F. Supp. 594 at 601 (E.D.N.Y. 1974) where the court said that the opinions of the treating physicians are entitled to substantially greater weight than the impressions of a doctor who saw the claimant only once.

The claimant testified extensively concerning pain and discomfort and impairments that were of such a severity that they prevented him from performing any work activity necessary for substantial gainful employment on a continuous basis. It was this testimony that was ignored by the administrative law judge because he observed the claimant having no signs of distress at the hearings. Testimony, such as the claimant's, should not be disregarded without explanation. *Cotter v. Harris*, 642 F.2d 700 at 705 (3rd Cir. 1981). Further, such testimony is entitled to great weight if it concurs with the testimony of a treating physician, as it does in the present case. *Podeworny v. Harris*, 745 F.2d 210 at 217 (3rd Cir. 1984). Rejection of subjective testimony, such as the claimant's must be based on substantial evidence and it is the position of the claimant that failure to suffer enough in the presence of the administrative law judge is not substantial evidence. *Van Horn v. Schweiker*, 717 F.2d 871 at 873 (3rd Cir. 1983).

In *Podeworny*, above, the Third Circuit cautioned the Social Security Administration about disregarding the opinion of attending physicians particularly when the opinion reflects an expert judgment based on a continuing observation of the patient's condition over a long period of time.

The prevailing law on how to treat the use of subjective symptoms such as testified to by the claimant is set forth in the case of *Page v. Celebrezze*, 311 F.2d 757 (5th Cir. 1963) where the court stated at 762-63 as follows:

> If pain is real to the patient and as such results in that person being physically unable to engage in any gainful occupations suited to his (or her) training and experience, and this results from "any medically determinable physical or mental impairment", the disability entitles the person to the statutory benefits even though the cause of such pain cannot be demonstrated by 'objective clinical and laboratory findings.'

Claimant is well aware that it is not enough that he be correct in his statement of the law for the Supreme Court to grant a writ of certiorari. In this case, as well as in thousands of other cases that come before the Social Security Administration to aid in determining a person's disability or degree thereof, the only doctor available to a poor claimant is his family doctor or doctors who sees him over a great period of time and is therefore much more informed about his physical condition than any consultative expert who renders an adverse opinion to a claim of disability. In order to establish and to emphasize the basic justice of a rule whereby a treating physician is entitled to a heavier consideration on a person's disability claim than a consultative physician, especially considering the type of claims that are being passed upon, it is essential and important for this Court to grant the writ and to make a definitive statement as to the validity of testimony and the weight of testimony offered on behalf of claimant by treating family physicians.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING L. BLOOM
Attorney for Petitioner

APPENDIX A — ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3086

WILLIAM TAYLOR

Appellant

vs.

SECRETARY OF HEALTH AND HUMAN SERVICES

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALITO, *Circuit Judges,* and POLLAK, *District Judge.**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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* Judge Pollak voted only as to rehearing before the original panel.

Appendix A

BY THE COURT,

s/ Carol Los Mansmann
Circuit Judge

Aug 08 1991

APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3086

WILLIAM TAYLOR

v.

OTIS BOWEN, Acting Secretary of Health and Human Services

(D.C. Civ. No. 86-1094)

WILLIAM TAYLOR

v.

LOUIS W. SULLIVAN, M.D.

(D.C. Civ. No. 89-1594)

WILLIAM TAYLOR,

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
District Judge: Honorable Glenn E. Mencer

Submitted Under Third Circuit Rule 12(6)

Appendix B

June 24, 1991

Before: MANSMANN and SCIRICA, *Circuit Judges,* and POLLAK, *District Judge.**

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

s/Carol Los Mansmann
Circuit Judge

Attest:

s/ M. Elizabeth Ferguson
Chief Deputy Clerk

Jul 02 1991

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* Honorable Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM TAYLOR,

Plaintiff,

vs.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Civil Action No. 86-1094 and 89-1594
Judge Glenn E. Mencer/Magistrate Sensenich

MEMORANDUM ORDER

This action was referred to Chief United States Magistrate Ila Jeanne Sensenich in accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1), and the Local Rules for Magistrates. The Magistrates Act allows the parties ten (10) days from the date of service to file written objections to a report and recommendation.

The magistrate's report and recommendation was filed on November 28, 1990, and recommended that defendant's motion for summary judgment be granted as to plaintiff's claim for disability insurance benefits and that the decision of the Secretary, be affirmed. It further recommended that defendant's motion for summary judgment be denied as to plaintiff's claim for

supplemental security income benefits and that that claim be remanded to the Secretary for reconsideration. Service of the report and recommendation was made on all parties and no objections have been filed. After review of the pleadings and documents in the case, together with the report and recommendation, the following order is entered:

AND NOW, this 8th day of January, 1991;

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted as to plaintiff's claim for disability insurance benefits and that the decision of the Secretary, is affirmed.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is denied as to plaintiff's claim for supplemental security income benefits and that that claim is remanded to the Secretary for reconsideration.

The report and recommendation of Magistrate Sensenich, dated November 28, 1990, is adopted as the opinion of the court.

s/ Glenn E. Mencer
GLENN E. MENCER
United States District Judge

cc: Ila Jeanne Sensenich
Chief U.S. Magistrate

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Appendix C

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APPENDIX D — RELEVANT STATUTES

§ 405. Evidence and procedure for establishment of benefits

(a) Rules and regulations; procedures. The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title [42 USCS §§ 401 et seq.], which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

(b) Administrative determination of entitlement to benefits; findings of fact; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations. (1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this title [42 USCS §§ 401 et seq.]. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, surviving divorced mother, surviving divorced father husband, divorced husband, widower,

surviving divorced husband, child or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this title [42 USCS §§ 401 et seq.]. In the course of any hearing, investigation or other proceedings, he may administer oaths and affirmations, examine witnesses and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure. (2) In any case where—

> (A) an individual is a recipient of disability insurance benefits, or of child's widow's, or widower's insurance benefits based on disability,
>
> (B) the physical or mental impairment on the basis of which such benefits are payable is found to have ceased, not to have

existed, or to no longer be disabling, and

(C) as a consequence of the finding described in subparagraph (B), such individual is determined by the Secretary not to be entitled to such benefits,

any reconsideration of the finding described in subparagraph (B), in connection with a reconsideration by the Secretary (before any hearing under paragraph (1) on the issue of such entitlement) of his determination described in subparagraph (C), shall be made only after opportunity for an evidentiary hearing, with regard to the finding described in subparagraph (B), which is reasonably accessible to such individual. Any reconsideration of a finding described in subparagraph (B) may be made either by the State agency or the Secretary where the finding was originally made by the State agency, and shall be made by the Secretary where the finding was originally made by the Secretary. In the case of a reconsideration by a State agency of a finding described in subparagraph (B) which was originally made by such State agency, the evidentiary hearing shall be held by an adjudicatory unit of the State agency other than the unit that made the finding described in subparagraph (B). In the case of a reconsideration by the Secretary of a finding described in subparagraph (B) which was originally made by the Secretary, the evidentiary hearing shall be held by a person other than the person or persons who made the finding described in subparagraph (B).

Appendix D

§ 405. Evidence and procedure for establishment of benefits

(a) [Unchanged]

(b) Administrative determination of entitlement to benefits; findings of fact; hearings; investigations, evidentiary hearings in reconsideration of disability benefit terminations.

(1), (2) [Unchanged]

(3)(A) A failure to timely request review of an initial adverse determination with respect to an application for any benefit under this title [42 USCS §§ 401 et seq.] or an adverse determination on reconsideration of such an initial determination shall not serve as a basis for denial of a subsequent application for any benefit under this title [42 USCS §§ 401 et seq.] if the applicant demonstrates that the applicant, or any other individual referred to in paragraph (1), failed to so request such a review acting in good faith reliance upon incorrect, incomplete, or misleading information, relating to the consequences of reapplying for benefits in lieu of seeking review of an adverse determination, provided by any officer or employee of the Social Security Administration or any State agency acting under section 221 [42 USCS §§ 441 et seq.]

(B) In any notice of an adverse determination with respect to which a review may be requested under paragraph (1), the Secretary shall describe

in clear and specific language the effect on possible entitlement to benefits under this title [42 USCS §§ 401 et seq.] of choosing to reapplying in lieu of requesting review of the determination.